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FEDERAL AND STATE LAW PRIMER

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While practical suggestions and tips are always helpful, it is prudent to occasionally revisit the major federal and state laws that apply to employers in the workplace. The following are the more common employment claims addressed in litigation:

- Louisiana Civil Rights Laws and Title VII of the Civil Rights Act, as amended—these laws protect individuals from discrimination on the basis of race, sex, religion, color, and national origin.
  - Employees who claim they were unlawfully terminated on one of these bases must prove their claim in one of two ways, by circumstantial or direct evidence.
  - A case based on circumstantial evidence generally is harder for the employee to prove. The employee must prove that he was terminated for engaging in conduct that other employees of a different race, gender, religion, etc. got away with under nearly identical circumstances and that the reason for the different treatment was race, gender, religion, etc.
  - *Consistent prior practice* is always the best defense against a circumstantial evidence claim.
  - Direct evidence is more troublesome. Employees in this kind of case attempt to prove discrimination by showing that managers or supervisors uttered discriminatory statements that tend to indicate the employment action in question was discriminatorily motivated. Thus, it's vital that all supervisors understand that inappropriate remarks can lead to serious discrimination claims and expensive lawsuits that are harder for employers to win.
- Sexual Harassment
  - Sexual harassment claims are on the rise. Fortunately, employers have an affirmative defense you can utilize to obtain the dismissal of lawsuits in which employees fail to report harassment or to take advantage of the complaint procedure in your harassment policy.
  - So it's critical that you have a strong anti-harassment policy with an effective complaint procedure that you can show has been distributed to all employees. Usually, the best way to do this is to have all employees sign a statement to acknowledge their receipt of a copy of your policy. Additionally, your policy should encourage all employees to report any harassment directly to their supervisors or a member of the Human Re-

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sources Department. All claims should be investigated and resolved promptly with appropriate documentation. Your quick response to a harassment complaint could save you thousands of dollars in litigation costs.

- The Age Discrimination in Employment Act
  - This law protects employees age 40 and over from discrimination in employment actions.
  - Employees also may attempt to prove age discrimination through circumstantial or direct evidence.
  - Generally speaking, it is unlawful to treat employees differently *because* they are over the age of 40.
  - For example, in a recent case an employer required a 55-year-old applicant to undergo a physical. The employer did not require other employees to undergo physicals and only had a concern in this case because of the individual's age. The court said the employer's action was unlawful age discrimination. The only valid grounds for requiring a physical are objective performance- or safety-related reasons.
  - There are a few exceptions, such as jobs that have bona fide occupational qualifications and retirement plans in which age and seniority can be taken into account.
- The Americans with Disabilities Act (ADA)
  - This law protects employees with covered disabilities from discrimination *because* of their disabilities. A disability is a physical or mental impairment that substantially limits a major life activity. Persons who have a record of being disabled or who are regarded as being disabled also are protected.
  - What is or is not a disability is a question for the courts to decide on a case-by-case basis. For example, one court recently held that an employee's inability to drive herself to and from work for six months did not constitute an impairment that substantially limited a major life activity since it was a temporary limitation.

The ADA is unique in that the law doesn't just prohibit employers from discriminating against disabled employees and applicants. It also requires you to attempt to find reasonable accommodations for employees with disabilities that will allow them to work. Absent undue hardship, you must attempt to accommodate an employee's disability such that the employee is able to perform to the same level as nondisabled employees.

- But even if an employee can do the job with an accommodation, you're not required to hire him if it would create a direct threat to the employee's safety or the safety of others in your workplace. To constitute a direct threat, there genuinely must be a significant risk of substantial harm.

- If an employee cannot perform satisfactorily with or without an accommodation, then the employee is not a "qualified" individual with a disability, and you are only obligated to place him in another available job for which he is qualified.

(Next issue: Whistleblowers, retaliation, and "employment torts.")

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact::

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